No. 15483

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

WILSON H. WALTERS,
CHARLES P. CAIN, and
KEITH TERRY, *Apellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from a Judgment of the United States District Court for the Eastern District of Washington, Northern Division

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BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

Appellants, jointly with James O. Jensen, were indicted for violating the fraud provisions of the Securities Act of 1933 [Section 17 (a) (1); 15 U.S.C.

77q (a) (1)], the Mail Fraud Statute (18 U.S.C. 1341), and for conspiring to violate these statutes (18 U.S.C. 371). The indictment contained eleven counts, Counts I through V each charging a specified use of the mails for the purpose of executing a scheme to defraud in violation of the Mail Fraud Statute; Counts VI through X each charging a specified use of the mails in the employment of a scheme to defraud in the sale of securities in violation of Section 17 (a) (1) of the Securities Act of 1933; and Count XI charging the conspiracy and setting forth fourteen overt acts allegedly committed by the defendants in pursuance of said conspiracy and to effect its objective.

All the defendants first pleaded not guilty. After commencement of the trial and several witnesses had testified the defendant Jensen entered a plea of guilty to Counts III and IV (mail fraud) and XI (conspiracy) (R. 282).① Jensen subsequently testified as a witness on behalf of the Government. At the conclusion of the trial the remaining counts were dismissed against Jensen.

The jury found appellant Walters guilty on all counts, and he was sentenced to imprisonment for a term of one year and six months on each count, the

①The letter "R" refers to the transcript of testimony filed with the Court fo Appeals for the Ninth Circuit.

sentences to run concurrently. Appellant Cain was found guilty on Counts I, III, and IV (mail fraud) and Count VI (fraud in the sale of securities) and Count XI (conspiracy), and found not guilty on the remaining counts. He was sentenced to imprisonment for a period of eight months on Count I (mail fraud). Imposition of sentence on the remaining counts was suspended, and a four-year probationary period imposed. Appellant Terry was found guilty on all counts except Count I. Imposition of sentence on the remaining counts was suspended and a four-year probationary period imposed.

This Court has jurisdiction of the instant case under the provisions of Title 28, Section 1291, U.S.C.A.

COUNTER-STATEMENT OF THE CASE

The indictment in this case charged, the defendants in substance, with devising a scheme to defraud investors in surplus certificates of Washington Insurance Company (Mutual), a Washington corporation, and investors in stock and preorganization subscriptions for stock of an unnamed insurance company to be organized which would specialize in fire insurance on motels. The scheme is set forth in Count I of the indictment, and the allegations in respect thereto are incorporated by reference in the remaining substantive counts. The indictment charged that as part of the scheme to defraud the defendants made and caused to be made certain false representations, pretenses, and promises, and in addition, as part of the scheme to mislead the investors and to persuade and induce them to part with their money for the securities, concealed from the investors material facts.

The specific misrepresentations, which numbered twelve, set forth in Count I of the indictment, are as follows:

(1) That defendants had obtained permission from the Insurance Commissioner of the State of Washington to solicit and receive funds to provide necessary capital reserves for a proposed fire insurance company to be organized which would specialize in insurance on motels.

(2) That the Insurance Commissioner of the State of Washington had authorized Washington Insurance Company (Mutual) to raise funds to establish a stock insurance company specializing in fire insurance on motels, through the sale to investors of its surplus certificates, which would bear interest at the rate of six per cent per annum.

(3) That all funds received from the sale of surplus certificates would be deposited in a place of safekeeping until released by order of the State Insurance Commissioner for use as capital of a stock insurance company to be organized, which would specialize in fire insurance on motels.

(4) That said defendants had been assured by the Insurance Commissioner of the State of Washington that he would authorize said proposed motel insurance company to write fire insurance on motels at a rate twenty-five per cent less than that charged by other fire insurance companies.

(5) That Washington Insurance Company (Mutual) would guarantee, and was financially able to pay, six per cent interest on surplus certificates issued to investors.

(6) That at any time within one year from the date of purchase of surplus certificates investors could convert their surplus certificates into stock of

the new motel insurance company having double the value of said surplus certificates.

(7) That investors in surplus certificates of Washington Insurance Company (Mutual) could obtain refunds of their investments at any time prior to the conversion of their surplus certificates into stock.

(8) That money invested in surplus certificates of Washington Insurance Company (Mutual) was safe and secure, since all funds so invested were subject to the control and supervision of the Insurance Commissioner of the State of Washington.

(9) That the owners of a large motel enterprise in Salt Lake City, commonly known as "Little America," had offered to provide all of the capital required for the proposed insurance company.

(10) That defendants had made substantial investments of their own funds in said proposed motel insurance company.

(11) That said defendants had given up highly lucrative positions in other businesses in order to become associated with said new motel insurance company.

(12) That the proposed motel insurance company had already commenced operation and acquired valu-

able insurance agencies and made valuable real estate investments.

The third paragraph of Count I of the indictment sets forth that defendants fraudulently omitted to state to investors material facts as follows:

(1) That Washington Insurance Company (Mutual) already had outstanding surplus certificates having a face value of over $75,000.

(2) That surplus certificates of Washington Insurance Company (Mutual) being sold and offered for sale to said investors included certificates having a face value of $30,000, but little actual value, which surplus certificates had previously been issued to and were then held by Washington Underwriters, Inc., an insurance agency of which defendant James O. Jensen was President.

(3) That the proceeds of the sale of the $30,000 of the aforesaid surplus certificates held by Washington Underwriters, Inc. would not be remitted to Washington Insurance Company (Mutual) but would be expended by Washington Underwriters, Inc. and by said defendants for their own benefit, including salaries and Christmas bonuses.

(4) That Washington Insurance Company (Mutual) was operating at a loss and did not then or at

any time in the past have a net earned surplus from which interest on its surplus certificates could be paid.

(5) That said defendants had not obtained or applied for a permit as required by the Insurance Code of the State of Washington to authorize them to solicit or receive funds to organize or finance an insurance company.

(6) That said defendants had agreed among themselves to use said funds obtained from investors in surplus certificates, to organize an insurance agency and not an insurance company.

Although the chief claim of all appellants is that the false representations which they allegedly made to investors were made in 'good faith" (Apps. Walters and Cain brief, p. 21; Terry brief, p. 10), in our opinion their statements of facts do not adequately set forth the evidence in the record, which plainly shows their fraudulent intent.① Since the argument which immediately follows discusses this evidence fully, it will not be repeated at this point.

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①Appellants apparently do not contest the Government's proofs that the defendants engaged in the sale of securities and that the mails were used to execute the scheme to defraud if such a scheme existed.

ARGUMENT

I

THE EVIDENCE CLEARLY ESTABLISHES THE SCHEME TO DEFRAUD CHARGED IN THE INDICTMENT AND THE WILLFUL PARTICIPATION OF APPELLANTS THEREIN. (APPELLANTS' POINTS I AND II).

The principal issue on this appeal is whether there was substantial evidence from which the jury could find that the appellants knowingly participated in the scheme to defraud. To reach their conclusion that appellants acted in "good faith" appellants urge that most of the testimony of the investor witnesses should be dismissed as having arisen from the investors' own "confusion"; that the inculpatory testimony of Jensen be disregarded as less reliable than that of Cain and Terry (Walters did not testify); that certain admitted misrepresentations should be disregarded because the investors did not rely upon them in purchasing their securities and that the diversion of investors' funds to the appellant's own use was too small to be regarded as motivation for such serious crimes as charged.

This Court has frequently held that in reviewing the record at this time it must take the view of the evidence which is most favorable to the Government and accept as true all the facts which the evidence reasonably tended to show. As stated by this Court

in *Suetter v. United States,* 140 F. 2d 103, 107 (CCA 9, 1944):

> "A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict. *Abrams v. United States,* 250 U. S. 616, 619; 40 S. Ct., 17, 18, 63 L. Ed. 1173. The evidence must be considered in the light most favorable to appellee. *Holmes v. United States,* 8 Cir., 134 F. 2d 125, 130; *Hemphill v. United States,* 9 Cir., 120 F. 2d 115, 117."

See: *Remmer v. United States,* 205 F. 2d 277, 287, 288 (CCA 9, 1953); *Schino v. United States,* 209 F. 2d 67, 72 (CCA 9, 1954).

In a case such as this the defense of "good faith" is but another way of stating that there was no intent to defraud, and as stated by the court in *Remmer v. United States,* 205 F. 2d, 277, 288, which related to fraud in an income tax evasion case:

> "A state of mind can seldom be proved by direct evidence but must be inferred from all the circumstances."

In *Hawley v. United States,* 133 F. 2d 966, 970 (CCA 10, 1943), the court said:

"But the question of good faith, honest belief, intentions and purposes, are, under these facts, questions which are properly within the province of the jury to decide under competent instructions from the court concerning the legal standards by which guilt or innocence must be judged."

In *Stone v. United States*, 113 F. 2d 70, 74, 75 (CCA 6, 1940), the court said in reference to the defense of good faith and intent as resolving itself into one of fact:

"We arrive at one's intention by taking hold of certain circumstances, extraneous though they may be, and reasoning out the purpose in doing the act. It is a mental process, but a man's intention is really a question of fact to be arrived at by the trier of the facts in the exercise of reasonable discretion, after considering all the circumstances connected with the act charged. Whatever result reasonably flows from an act is presumed to have been intended by the person who did it.

* * *

"Where guilty knowledge is an element in the offense, as in consiracy charges and the use of the mails to defraud, the knowledge must be found from the evdience beyond a reasonable doubt, but actual knowledge is not required; it may be inferred. Scienter may be inferred where the lack of knowledge consists of ignorance of facts which any ordinary person under similar circumstances should have known. Ignorance of inculpatory facts is no more a defense than ignorance of inculpatory law."

Before considering the specific evidence which refutes appellants' contentions, it should be emphasized, as the record clearly establishes, that appellants were experienced in the insurance business (Exs. 83, 85; R. 924, 925, 928-31), were advised regarding the requirements of the insurance laws of Washington (R. 447-8), and their victims were for the most part uninformed laymen, chiefly farmers, who, however gullible, are entitled to as full protection against securities fraud as are sophisticated investors. *U. S. v. Monjar,* 47 F. Supp. 421, 425 (D.C. Del. 1942), affirmed 147 F. (2d) 916 (C.A. 3, 1944), cert. den. 325 U. S. 859.

We will show that the testimony of the witnesses was remarkably clear in describing a uniform pattern of misrepresentation; that any confusion in the evidence is that consciously injected by appellants in attempting to invent some explanation for their fraudulent statements; and that there is substantial evidence, although directly conflicting with that of appellants, that each of the appellants knew that the false statements made to prospective investors, as alleged in the indictment, were false.

As to appellants' contention that the amounts they received from the investors' funds were too insignificant to be considered a motive for these serious

crimes, which we do not concede①, such circumstances would not exculpate them. This indictment did not charge appellants with larceny or embezzlement, but with participating in a scheme to defraud by misrepresentation. As stated by the court in *U. S. v. New South Farm,* 241 U. S. 64, 71.

> "When the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme and artifice which the statute denounces."

It has become well settled that it is not a good defense in a case of this sort that the defendants had confidence in the ultimate success of an enterprise and so expected ultimately to save the investors from loss or even make profits for them. If they intended to obtain the money by means of false representations or promises there would be a violation of the laws by the ones so intending. *Deaver v. United States,* 155 F. 2d 740, 744; *Pandolfo v. United States,* 286 F. 8, 13; *Moore v. United States,* 2 F. 2d 839, 841; *Foshay v. United States,* 68 F. 2d 205; *Linn v. United States,* 234 F. 543.

We will show that in this case the evidence is abundant that all appellants embarked on a scheme

①Appellants fared well in their brief venture. Walters received $10,031.09, Cain $5,348.76, Terry $5,382.63 for less than seven months of very intermittent service. Jensen received $12,248.05. (R. 779)

to lure investors by false assurances that their investments were subject to the statutory protective safeguards of the insurance laws of the State of Washington against fly-by-night insurance company promotions, knowing at the time that they were deliberately evading the requirements of those laws. We will show that they concealed and misrepresented to the investors facts known to them regarding the soundness of the investment and regarding their own private arrangements for setting up their new venture with the investors' funds.

A. *The Walters Plan for Motel Insurance at a Deviated rate*

The instant venture was predicated upon a plan conceived by Walters in 1954 (1) to take over an existing "broken down insurance company" (R. 448, 1017, 1018) and (2) use it as a vehicle to raise money (a) to finance a new insurance *agency* specializing in selling insurance to motels at a reduced or deviated rate and (b) to provide surplus for the insurance company.

In July or August 1954, Walters found the broken down insurance company he was seeking in Washington Insurance Company (Mutual), which had had an uncertain existence since 1948. He enlisted Cain (R. 1015), and they discussed the motel insurance idea with Jensen, the president of the company. The pos-

sibility of forming a new insurance company was discussed by Jensen, Walters, and Cain, but in view of the statutory requirements of a permit, bond, and escrow under the state law, it was decided it could not be done (R. 447-8). Walters assured Jensen that he would raise sufficient finances to put Washington Insurance Company (Mutual) "in good shape" (R. 433-6). Jensen acquiesced in the Walters plan, which was set down in a formal agreement signed by Walters, Jensen, and Cain September 30, 1954 (Ex. 46).①

Under the terms of the complicated agreement, which was never shown to any of the investor-witnesses who testified in the case, there would be sold to the public (1) $25,000 of surplus certificates of Washington Insurance Company (Mutual)② which had been authorized in September 1953 to permit this company to obtain additional reserve capital (Ex. 29), and (2) $30,000 of outstanding surplus certificates previously issued by Washington Insurance Company to its agency company, Washington Under-

①A fourth party to the agreement, Robert Harris, did not join in the promotional efforts and soon was dropped from the venture. There was discussion that he would be replaced by Terry (R. 460, 464, 466, 1287-94) in sharing in the promotional stock to be issued in the new agency company.

②Surplus certificates are instruments evidencing borrowed capital and, by their terms, are payable only out of net earned surplus (Ex. 3A).

writers, Inc. The funds to be obtained by the sale of the surplus certificates would be distributed as follows: $10,000 for expenses of setting up the project; $20,000 to Washington Insurance Company (Mutual); and $25,000 to the agency company.

B. *Terry Joins Promotional Group*

Walters and Cain talked to Terry, who was then engaged in selling mattresses to motels (R. 1031), in Spokane, Washington, in August 1954 (R. 1144). They described their plan for selling insurance to motels at a deviated rate and for rejuvenating Washington Insurance Company (Mutual). Terry desired to have a share in the management of the new agency company and also wanted to see how the public would react to the Walters-Cain sales talk. He accompanied them on two trips, supplying them with former insurance customers of his, to test the sales pitch. Walters gave the presentation to one prospect (R. 1052) and Cain to another (R. 1063). Terry was then brought to Seattle in October 1954, where he met Jensen (R. 456-7, 1164). Jensen showed him the company's financial report (R. 544-5), told him the company's history and condition (R. 463, 468-9), and all discussed the agreement of September 30, 1954, and the possibility of Terry's getting promotional stock in the new agency company (R. 457).① Jensen

①Both Terry and Cain testified that Terry saw the agreement at least at a later date (R. 1069, 1287-1290).

also explained to Terry, as well as Cain, that the idea of the deviated rate was impossible (R. 468) because of the company's lack of insurance experience. He had previously given a similar explanation to Walters (R. 436). Jensen explaned to all appellants that the only way reduced insurance rates to motels could be arranged would be to write the insurance on the mutual plan, and if the loss experience was favorable grant them a larger dividend. Terry accepted this idea, saying, "Well, I can sell it that way. I can sell it that way." (R. 586)

C. *Sales of Surplus Certificates in Excess of Authorization*

At the outset of the sales campaign Walters prepared a sales kit containing factual information reflecting the earning records and appreciation of stock values of several well known insurance companies, particularly those engaged in writing insurance for limited groups such as hardware men, druggists, and lumbermen (R. 465). Armed with this kit, Cain and Terry made most of the sales, which proceeded with great success. Interest was paid on some certificates already sold, but was paid out of the proceeds of the sale of surplus certificates and not out of income (R. 591-2, 210). Some investors were "reloaded," with assurances that only a small additional amount was needed to meet the full quota of capital

required. Cain persuaded Frank Miller, a farmer with four infant children, to borrow on his life insurance policy, as this was his last chance to get in on the ground floor (R. 264; Ex. 42). Terry told the Schneidmiller brothers that with their $500 additional investment they would be able to start the company (R. 904). Cain and Terry obtained $4500 from Evansons on their second call, assuring them that was all they needed and then they were ready to start the company (R. 840).

By December 15, or earlier, the entire $55,000 of surplus certificates had been sold (R. 1041, 474).①

The question of exceeding the $55,000 limit and selling unauthorized surplus certificates was then discussed, and the group decided to go along with the continued sale (R. 476). At about this time Walters was clamoring for a Christmas bonus to be paid to himself, Terry, and Cain (R. 475).② Although Cain

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①The company records showed the following cash receipts from investors on the respective dates: (R. 781-)

Total sold August 1 to December 15, 1954	$ 56,000
Total sold to December 31, 1954	72,000
Total sold to January 31, 1955	89,000
Total sold to March 2, 1955	104,700

②Checks dated December 23 in the amount of $500 each were issued to Cain, Walters, and Terry. Jensen states he was reluctant to pay the bonuses because the expenses were getting high (R. 475).

was apparently not present at this pre-Christmas meeting, he knew that the limit had been reached (R. 1041), and made sales thereafter to Garrett (R. 762) and Prichard (R. 863) and continued to draw his pay.①

At a meeting in January, Jensen, Walters, and Terry had a further discussion about the continuing sale of unauthorized surplus certificates. Terry suggested that they could pick up the surplus certificates and give the investors receipts to be held until the stock was issued. The idea of giving the money back to investors was definitely rejected (R. 478-480).

On February 1, 1955, Hollenback, an insurance examiner from the Washington Insurance Department, called at the office of Washington Insurance Company (Mutual) and made a cursory examination, as a result of which he found evidence of the sale of the unauthorized surplus certificates. He immediately reported this to Chief Insurance Examiner Bradley, who orally ordered Jensen to cease the sale of surplus certificates immediately (R. 803). Bradley followed this up with a letter dated February 3 (Ex. 17;

①Soon thereafter Cain left the organization for a time and went to Denver. There was considerable dissension among the group over suspicion that Cain had gone to work on another job (R. 505, 508). Cain continued to look for his pay (R. 507) and drew his checks until January 19, 1954 (R. 833).

R. 484). Jensen communicated Bradley's orders to Cain, Walters, and Terry (R. 485, 588).

D. *Attempts to Conceal Over-Sale*

No sales of surplus certificates appear to have been made following the Bradley letter, although thereafter Terry turned in approximately $12,500 previously obtained from investors (R. 549-550). Walters, Terry and Jensen made extensive efforts to conceal their unauthorized sales, following Terry's plan to not deliver surplus certificates to investors and substitute in lieu of the certificates, receipts for stock to be issued (R. 490, 494). Terry and Walters called on investors and went through motions of showing surplus certificates which they stated they had inadvertently neglected to have signed by the president (R. 628, 629, 892) or told the investors that they had left the certificates behind (R. 608, 616, 617). They described to these investors in glowing terms the rapid progress which they had made toward starting the new company (R. 153, 191) and in some cases said that the company was already organized (R. 321), had purchased an insurance agency (R. 153), or was contemplating the purchase of a motel with its reserve funds, so that it would be making money while the insurance features were being ironed out (R. 223, 321-324). Pictures of the new company quarters were shown (R. 153, 322). Those investors who had not received surplus cer-

tificates were urged to sign receipts evidencing their willingness to take stock of "the market value of $2.00 a share" (in the yet unorganized company) in lieu of surplus certificates (Ex. 96, R. 895; 628-629). Investors who had received surplus certificates were exhorted to turn them in for stock which they were assured would be promptly issued (R. 153, 222, 323, 292). Meanwhile, as the surplus certificates were picked up from investors, Jensen performed a bookkeeping deception by showing transfers of surplus certificates on the books from one investor to another, instead of new issue certificates, thus reducing the amount of outstanding surplus certificates shown and intending to conceal the over-sale from the Insurance Department examiners (R. 480-482).①

During the first ten days of February 1955, Hollenback was in the office of Washington Insurance Company (Mutual) making his examination, and observed applelants Walters and Terry on the premises, Walters being there nearly every day (R. 817). Neither of them made any disclosure to him of what they were doing, of the proposed new company to be formed, or of the sale of surplus certificates and the exchange of these certificates for stock (R. 823).

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①Cain does not appear to have participated in this exchange of surplus certificates for receipts.

During March 1955 "rehabilitation proceedings"① were commenced by the Washington Insurance Commissioner against Washington Insurance Company (Mutual), but Terry gave no indication to investors of any difficulty. On March 14 he told Jack Schlee, in Spokane, that all was coming along fine (R. 370). About April 28 Hollenback sent out letters to investors to verify their purchases of surplus certificates and indicating the imminence of a receivership. One such letter was received by investor Elmer Schneidmiller, who then called Terry to inquire about the situation. Terry told him he had talked to Hollenback, who made the statement, "The company was in better condition than ever" (R. 652). Hollenback denied making such statement (R. 814, 825). Mary Evanson, an investor, also received such a letter from the Insurance Commissioner (R. 847) and called Terry on the telephone. Terry told her "there was nothing to be worried about, that they were having a little investigation, and that everything was fine and he would be down in a day or two."

Walters continued to receive checks as late as March 19, 1955, and Terry received his last check on April 20 (R. 833). By this later date Terry and Walters had commenced another insurance deal in

①Soon thereafter Washington Insurance Company (Mutual) was ordered into State receivership (Ex. 8M).

Alaska, and wrote Jensen April 5, 1955, from Alaska, saying in part, "The deal here looks good. . . . Do we get paid on the 15th?" (Ex. 62; R. 512-5).

E. *Fraudulent Misrepresentations and Omissions*

(1) *Relating to the Approval of the Venture by the Washington Insurance Commissioner*

The very core of this scheme to defraud was the composite representation that this was a safe and secure investment because the entire plan was being carried out under the protective supervision of the Insurance Commissioner of the State of Washington.① In essence, it was represented that this entire plan for which funds were being raised had been submitted to the Washington Insurance Commissioner, who had given his preliminary approval. Final approval awaited only the raising of the necessary capital reserves to qualify for *an insurance company charter*. Meanwhile, the funds would be held in escrow under the control or supervision of the Insurance Commissioner and could not be used for the promoters' expenses (R. 368). Investors would receive 6% interest from Washington Insurance Com-

①The allegations of fraud in this respect are specified in the second paragraph of Count I of the indictment, numbered 1, 2, 3, 4, and 8, and in paragraph 3 of Count I, material omissions numbered 5 and 6.

pany until the new insurance company was formed. At that tmie they could exchange their cerificates for stock in the new insurance company at the rate of two shares of stock for each $1.00 of surplus certificates.

Albee, an investor-witness, testified that Walters told him: (R. 399)

> "A. They said that they were selling surplus certificates and that the least that we could expect on our money was the 6% interest from them; that they were safe from the standpoint that the Insurance Commissioner of the State of Washington had approved their sale and that the State of Washington had very strong insurance laws and Mr. Sullivan, the Insurance Commissioner, is a very highly respected Insurance Commissioner throughout the country, and that there just was no way to go wrong on the deal."

Investor-witness Garrett testified concerning the statements of Cain and Terry (R. 762):

> "Well, that they were forming a new insurance company, selling these surplus certificates. The Washington Insurance, Mutual was the mother company for these surplus certificates and this new insurance company was to be a company to insure motels exclusively, and they were raising $100,000 in these surplus certificates . . ."

and at R. 763 Garrett testified:

> "Well, they said the Washington Insurance Company (Mutual) was an old established company which had lots of insurance in force, an up and

> coming company, and this new company to be formed would be the insurer of motels exclusively, and that they had the permission from Mr. Sullivan, the Insurance Commissioner, to sell the surplus certificates and the money would be put in escrow under Mr. Sullivan's supervision until the total amount was raised . . .
>
> Q. Now after the total amount was raised what would happen then?
>
> A. Well, then we would have a chance to trade our surplus certificates two to one for stock in the new company.
>
> Q. Now was all of the money to be put in escrow under the Insurance Commissioner, did they tell you?
>
> A. Every dollar of it was to be in escrow."

As Terry explained it to investor-witness Mary Evanson (R. 841):

> . . . "But we asked them again about the security of the company, and they assured us that you couldn't lose, that is all there was to it, that the least you could get was your 6%."

Of the same tenor was the testimony of Jolly (R. 207) (Terry and Cain), Adams (R. 137) (Terry and Cain), Miller (R. 258) (Terry and Cain), Schierman (R. 601) (Terry), Goodwater (R. 623) (Terry), Schultheis (R. 329) (Terry), Wirth (R. 352) (Terry), Schlee (R. 366) (Terry), and Nichols (R. 890) (Terry). Investors were told that the application for

a deviated rate had been applied for (Adams, R. 148, 186; Schlee, R. 368; Schultheis, R. 331), and preliminary approval had been granted. (Schierman, R. 603).

The representations made by appellants regarding the approval of the Insurance Commissioner for their plan were entirely false. To raise funds for any type of promotion for a new insurance company requires, first, a solicitation permit, and second, that the funds be escrowed.① So, also any "deviated rate" would require approval of the Insurance Commissioner (R.

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①The Washington Insurance Code sets up definite requirements relating to the promotion of an insurance company (R. 697-702). These were set forth in part in the Court's instructions (R. 1343):

> "*RCW 48.06.030 Solicitation Permit*: No person forming or proposing to form in this state an insurer, or insurance holding corporation, or stock corporation to finance an insurer or insurance production therefor, or corporation to manage an insurer, or corporation to be attorney-in-fact for a reciprocal insurer, or a syndicate for any of such purposes, shall advertise, or solicit or receive any funds, agreement, stock subscription, or membership on account thereof unless he has applied for and has received from the Commissioner a solicitation permit."
>
> "*RCW 48.06.120 Escrow of Funds.* 1. All funds received pursuant to a solicitation permit shall be deposited and held in escrow in a bank or trust company under an agreement approved by the Commissioner. No part of any such deposit shall be withdrawn, except:"

705).① No application for a solicitation permit to raise money for a new insurance company was ever filed with the Insurance Commissioner, no application for a deviated rate was ever made, and no disclosure was ever made to the Insurance Department by the promoters of this venture that a motel insurance company with a deviated rate feature was being promoted (R. 701-705, 753-754). Jensen testified that he informed Cain, Walters and Terry that

①Under the Washington Insurance Code, RCW 48.19.040, et seq., rates are filed for fire insurance companies by an insurance rating bureau, of which they are members. Deviations by a subscriber member require specific application and approval (RCW 48.19.280) based on applicable provisions of rate making as provided in RCW 48.19.030.

such a deviated rate could not be obtained at that time (R. 436, 468, 469).②

Appellants' claimed, during the trial, that they represented to investors that they intended merely to raise funds to start an insurance *agency*. Quite obviously, if defendants could show that merely an agency was to be formed, their activity would have lost much of its color of illegality, since no application to or approval by the Insurance Commissioner would be required to organize an insurance agency and no escrow of funds would be necessary.

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②Appellant Terry concedes this representation was made and that he was instructed to make it and furnished material about it in his sales kit (Terry Br. 14). Appellants Walters and Cain also concede that the proposed deviated rate was one of the "prime moving causes of the entire transaction," but believed or were *led* to believe it could be obtained (Walters and Cain Brief pp. 14-15). They cited the testimony of Jensen (R. 586). We believe they have misunderstood his testimony. Jensen explained that a deviated rate for motels was impossible at that time, and that the only way motels could receive any advantage would be by the customary procedure of mutual companies in granting an increased dividend if the motel loss experience justified it. Such a procedure, of course, would have little selling appeal for the insurance company, since similar procedures could be employed by any competitor, and it amounted only to a promise of a possible rebate rather than an actual present reduced rate.

Throughout the trial appellants sought to break down the testimony of the investor-witnesses to fit this pattern of their defense, to which they subsequently testified. The witnesses as emphatically denied that they had been told of any plan to start an *agency* and clearly testified that they had been told of a plan to start an insurance *company* (R. 96-96, Ex. 106, 187-188, 302, 342-343, 361-362, 366, 376, 637, 852).

Much of the sales talk of appellants would have been meaningless and inconsistent if, as they testified, they told the investors only of a plan to set up an insurance agency. Thus, it was represented to investors that their money would be used for capital reserves for the new insurance company and that when the required amount was obtained the Insurance Commissioner would authorize their charter (R. 208, 352, 366, 602-603, 763, 907).

Appellants' entire sales talk to investors and the material in their sales kits was built around the success of insurance *companies* insuring specialized groups at reduced rates (Ex. 106, R. 138, 1087-1088) and the safety of an venture authorized and supervised by the State Insurance Commissioner under whose control the funds would be escrowed. There was no sales appeal in selling stock in an insurance agency, and appellants knew it.

Perhaps the most sinister feature of appellants' sales representations was the use of photocopies of the letter from the Insurance Commissioner dated September 3, 1953 (Ex. 29), authorizing Washington Insurance Company (Mutual) to sell $25,000 of surplus certificates to increase its capital reserves. This letter, carrying the signature of the Commissioner on his letterhead, was almost always placed before the investors to show that their plans were under the supervision of the Insurance Commissioner and was used so artfully that appellants' claims were never questioned (R. 72, 149, 214, 260, 329, 400, 867), due in large part to the fact that they were dealing with many of their former insurance customers, who trusted them (R. 244). The letter was used without disclosing the circumstances of its issuance (R. 697), the fact that it was not issued in connection with this motel insurance plan, that no escrow was required for the funds to be raised thereunder, that its $25,000 authorized limit had already been exceeded, and that it did not cover surplus certificates previously issued and outstanding and owned by Washington Underwriters which were being sold (R. 217, 299, 1037). The use of this letter was itself sufficient to show the fraudulent intent of all of the appellants.

(2) *Representations and Omissions Regarding the Financial Advantages of Investing in Surplus Certificates of Washington Insurance Company (Mutual)*①

It was part of the representations made to investors that an investment in surplus certificates would assure a return of 6% per annum on the investment during the period while the money was in escrow and the investor was deciding whether he wished to convert his surplus certificates into shares of the new insurance company being formed. Investors were usually told that they would have one year to decide regarding this conversion, and, if they desired, they could then leave their money invested in the surplus certificates and continue to draw 6% interest, and that they could withdraw or obtain refund of their money at any time prior to conversion of their surplus certificates into stock (R. 62, 332, 366, 767, 842). Washington Insurance Company (Mutual) was usually described as a small, but growing and prospering concern (R. 323, 334, 382, 624, 866, 901). As presented to investors, this feature of 6% interest with the assured safety of the funds under the control of the Insurance Commissioner was one of the chief inducements. Mr. Berry was told by Walters it was "as good as money in the bank at 6%" (R. 389). Cain

①These misrepresentations are contained in the second paragraph of Count I of the indictment, numbered 5 and 7, and in the allegations of omissions in the third paragraph, numbered 1, 2 and 4.

and Terry assured Evansons "you just couldn't lose, that's all there was to it, that the least you could get was your 6%" (R. 841).

No disclosure was made that Washington Insurance Company (Mutual) was and had been operating at a loss or that it had failed to pay interest on its outstanding surplus certificates (R. 837, 148, 149). Despite the fact that the subscription agreement (Ex. 105) signed in connection with the sale of surplus certificates expressly described the issue as being sold by and for Washington Insurance Company (Mutual), no disclosure was made that $30,000 of the certificates were certificates already outstanding in the hands of Washington Underwriters, Inc., that the proceeds from the sale of these certificates were being used to pay the promoters' salaries and expenses (R. 1070, 1081), and under the terms of their secret agreement (Ex. 46) would never go to Washington Insurance Company (Mutual) (R. 1040-1041, 1295), or to start an insurance company.

As indicated in the Statement of Facts above, there was testimony by Jensen that Cain, Terry and Walters all were shown data relating to the history and true financial condition of Washington Insurance Company (Mutual) (R. 544-545), that they were aware of the expenses of the promotion (R. 583). Of course Cain and Walters were parties to the

secret agreement and Terry knew its contents (Ex. 46). Cain even admitted he had never seen a financial statement, did not know if the company had any earned surplus out of which the interest and principal of the surplus certificates could be paid (R. 1049), and admitted that Jensen's lawyer, Rutherford, told him "the company had never paid a dime of interest" on its surplus certificates (R. 1050-1051).

In view of Jensen's testimony and Cain's admission of the Rutherford statement, certainly appellants were chargeable with knowledge of the shaky financial condition of Washington Insurance Company (Mutual). With such knowledge their representations regarding secure income from investment in surplus certificates of this company were knowingly and willfully falsely made and appellants can make no valid claim that they acted in "good faith".

(3) *Representations Relating to Appellants' Personal Interest in the Venture*①

To a large extent investors were influenced by the fact that Cain and Terry, whom they regarded as insurance men with a considerable knowledge of the business, highly recommended this investment. Both Cain and Terry told investors that they had made great personal sacrifices in leaving much better paying positions to undertake the organization of this new insurance company because it offered them such wonderful opportunities for future earnings in the insurance business. This was graphically demon-

①These misrepresentations are contined in the second paragraph of Count I of the indictment, numbered 10 and 11, and in the omissions numbered 3 and 6 in the third paragraph of Count I.

strated by both Cain and Terry producing evidence of their past earnings and statements that they had left jobs paying $28,000 to $30,000 to work on this deal (R. 72, 143, 183, 260, 357, 768, 1019-20). Defendants also represented to investors that they had made substantial financial investments of their own (R. 101, 183, 218, 628, 668, 307). Cain indicated that he had mortgaged everything he had to invest in the company (R. 260). They represented that all of the investors' money would be escrowed and none would be used to pay them, but they would obtain their returns at a later date in the sale of the new motel insurance (R. 368-369, 647-8, 869).

The facts were that defendants admittedly had not given up particularly lucrative jobs. Cain had transferred from another insurance company paying an equivalent salary (R. 1018), and had enjoyed a rather transient experience as an insurance salesman over the years (R. 1013). Terry admitted to an income the preceding year of approximately $3,400 (R. 1226), and was engaged in the sale of mattresses at the time he entered on employment in this venture. Neither Cain, Walters, or Terry invested a cent in the venture. Apparently in an effort to justify the representation relating to his investment, Terry testified that he had turned in two automobiles on the purchase of an automobile for Cain's use in selling the surplus certificates. The facts were that this auto-

mobile was purchased for Cain, who gave his note to Terry (R. 1005). The automobile never became an asset of Washington Insurance Company (Mutual) (R. 552, 1054-1055).

(4) *Representation Regarding the Offer of Investment by "Little America" Interests*

Investors were told by Cain and Terry that the motel insurance plan would receive such spontaneous reception from motel owners that the new company would be virtually assured of a large percentage of the motel insurance business. This, of course, was keyed to the basic representation, indeed attractive although baseless, that motels would be offered their insurance at a 25% reduced rate. In explaining the enthusiasm of the motel owners for the plan, Cain and Terry told investors that the "Little America" motel interests, a nationally known motel enterprise in Salt Lake City and Wyoming, had offered to advance the entire capital needed to set up the organization (R. 61, 140, 847, 868). It was then pointed out that the offer had been rejected because it was not desired to have control of the company in the hands of one organization. For this reason, investors were told, investments were being limited to $10,000 (R. 765).

The story of the "Little America" offer appears to have originated with Walters (Terry Br. p. 17;

R. 1094), who told Cain his former employers in Idaho had contacted the Coveys, owners of "Little America" (R. 1094). To prove its falsity, Mr. Stephen G. Covey was called by the Government to testify. He explained that the Little America Motel was owned by his family and some other associates. He recalled having some discussion with an unidentified person about purchasing insurance at lower rates, but denied that there had been any talk about an investment in a corporation which would offer such insurance (R. 250). Covey then was asked (R. 254):

> "Q. Is it possible your brother could have had a conversation with someone at some time about insurance?
>
> "A. I am very doubtful and my brother would be very unapt to even discuss this type of thing to the extent of anything that was of an arranging nature. I don't think he even would be into the subject."

No testimony was introduced by defendants that any person from Little America did make any such arrangement as claimed by defendants.

F. *Summary*

Appellants cite numerous cases (Walters-Cain Br. 21-22) with which we have no quarrel. These cases merely recognize that "good faith" is a defense in a fraud case. Such a defense was fully presented and fully argued by counsel. The jury rejected it.

The appellants also cite *Krulewitch v. U. S.*, 336 U. S. 440 and quote the admonition of Justice Jackson in his minority opinion. Neither the case nor the remarks of Justice Jackson have any application here. This was no case where a conspiracy count was added for procedural advantage. The evidence of participation in the common scheme and conspiracy of all those indicted was overwhelming. Analysis of their misrepresentations shows a striking similarity among the false statement made by the several appellants, and indicates, we submit, a close knit scheme of operation involving full exchange of methods for the more effective gulling of investors. All that can properly be said is that the conspirators had a falling out before the trial of this case. While "thieves fall out", this does not detract from the fact that they continued long enough in their common scheme to perpetrate the fraud charged to them and thereby each became charged with responsibility for the acts and statements of the others.

Coplin v. U.S., 88 F. 2d 652, 660 (CCA 9, 1937), *cert. den.* 301 U. S. 703; *Bogy v. U. S.*, 96 F. 2d 734, 741, 1930, *cert. den.*, 305 U. S. 608; *Lewis v. U. S.*, 38 F. 2d 406, 415 (CAA 9, 1930). See *Baldwin v. U.S.*, 72 F. 2d 810, 814 (CCA 9, 1934).

This trial lasted over two weeks, 33 witnesses testified, the record comprising nearly 1400 pages of transcript and 111 exhibits. The case was presented to an impartial jury under a full and fair set of instructions and the essential elements of conspiracy and fraud and the defenses thereto were carefully outlined by the Judge to the jury. There was ample basis for the jury's conclusion that the defendants were all knowing participants in the fraudulent scheme and conspiracy.

II

THE COURT GAVE AN ADEQUATE INSTRUCTION AS TO THE DEFENSE OF "GOOD FAITH". (TERRY BRIEF, POINT III; WALTERS-CAIN BRIEF, POINT IV).

Appellants have challenged the trial court's instruction as to the defense of "good faith", contending that the instruction given was inadequate, "made no effort to define good faith"; and that the court, "devoted only a single sentence", to this point. (Walters-Cain Br. 27; Terry Br. 23).

It is to be noted initially that the record reveals appellants made no objection to any portion of the

charge concerning "good faith", nor did they object to the omission therefrom of any of their requested instructions concerning "good faith" as required by Rule 30, Federal Rules of Criminal Procedure, 18 U.S.C.A. Although the point may be disposed of on this ground alone,① it is not necessary to do so, since the trial court's instructions more than adequately defined "good faith".

Appellants, in arguing that the cited portion of the charge relating to good faith was insufficient (Walters Br. 27), have failed to point out other portions of the instructions which taken as a whole clearly state the proper law applicable to the proffered defense. See *Askins v. U. S.*, 231 F. 2d 741 (CCA D.C., 1956), *cert. den.*, 351 U. S. 989 (1956); *Herzog v. U. S.*, 235 F. 2d 664, 667 (CCA 9, 1956).

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①In addition, appellants did not comply with Rule 18(2) (d) of this court requiring that appellants' brief shall contain, in the order there stated—

> "In all cases, a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. * * * When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial."

See *Kobey v. U. S.*, 208 F. 2d 583, 587 (CCA 9, 1953).

In other parts of the charge the court specifically referred to the defense of good faith by stating:

> "False representations, pretenses, and promises, within the meaning of the law, mean any representations regarding present or past facts, any opinions expressed by defendants, and any predictions or promises as to the future, *not made in good faith . . .*" (emphasis added) (R. 1344).

and the court, in another portion of the charge, instructed the jury that:

> "There can be honest, though mistaken, judgment of the future from existing conditions; even sincere but visionary optimism is allowable . . ." (R. 1345).

Furthermore, the court specifically charged the jury that:

> "Ordinarily, fraud cannot be predicated upon promissory statements or promises of what will occur or is likely to occur in the future. A mere promise or prophecy will not support an action for fraud, but promises and representations regarding a future event with fraudulent intent to deceive and without the intention of performing them at the time they are uttered are fraudulent. Opinions and beliefs are not fraudulent.
>
> "If any of the defendants made promises and predictions of future events which were glowing, spectacular, and grandoise, the test is whether

> or not he actually believed them at the time they were uttered. If he believed them at the time they were uttered, they were not fraudulent, but if he believed in his own mind that they would not materialize, or if they were made recklessly without knowledge of the facts and with intent to deceive, then the representations were fraudulent." (R. 1341-1342).

In addition, in the instruction relating to the charge of conspiracy, the court stated:

> "If the prosecution fails to establish one or more of these elements from the evidence beyond a reasonable doubt, then you should acquit the defendant of the charge of conspiracy as to the particular defendant under consideration.
>
> "To conspire means to participate willfully and purposely in the agreement with specific intent to violate the law or reckless disregard as to whether participants act in violation of law, so that a person intentionally encouraging, advising, or assisting other conspirators for the purpose of furthering their enterprise or scheme, with understanding of its lawful character, becomes a willful participant in the conspiracy.
> "The charge of conspiracy involves an evil mind and a wrongful intent. The purpose of the conspiracy statute is to protect against forming an agreement to intentionally defraud others, and if a defendant acted in good faith and had an honest belief in the work in which he was engaged and in any statements which he made, he was not guilty of the crime of conspiracy." (R. 1355).

Moreover the court specifically charged the jurors that they, "should consider the court's instructions

as as a whole and not place special emphasis on any part of them". (R. 1334).

The cases of *Morissette v. U. S.*, ~~324~~ 342 U. S. 246 (1952) and *Little v. U. S.*, ~~78~~ 73 F. 2d 861 (CCA 10, 1934), relied upon by appellants have little relevance since, unlike the instant case, they discuss situations where the trial court completely failed to charge as to certain essentials. Similarly, in *McAffee v. U. S.*, 105 F. 2d 21, the court held it error where the trial court refused to give certain proper instructions requested by defendant either in terms or in substance. And in *Hawley v. U. S.*, 133 F. 2d 966 (CCA 10, 1943), the appellate court, in approving the trial court's instructions as to good faith in that case affords us no guide as to the appropriateness of the charge given in the instant case.

It cannot be contended that the instructions given by the lower court were inadequate because they did not define the term "good faith." In this connection, it is noted that the instructions accepted by defendants as proper in the *Hawley* case, *supra;* and in *Coleman v. U. S.*, 167 F. 2d 837 (CCA 5, 1948) (Walters Br. 28-29, 30-31) do not attempt to define the term "good faith" but merely employ analogous language used by the court below. It is well established that words in common use clearly understood by the

jurors require no definition.② The term "good faith" is of that character, being a term of universal usage, having no hidden or technical meaning.

The argument that the instruction should have been longer and more emphatic, taking the form as requested by appellant, Terry, is also without merit. "A court is not required to charge the jury in any particular form of words, and it is not necessary for the charge given to be framed in words suitable to counsel." *Knight v. U. S.,* 123 F. 2d 959, 961 (CCA 5, 1942). All that is required is that the charge fairly state the law applicable to the case, and there is no contention that the instruction in the instant case was erroneous. If this is done, there can be no error if the court refuses to give a requested charge.③

III

THE TRIAL COURT PROPERLY ALLOWED THE JURY TO CONSIDER THE TESTIMONY OF WITNESS COVEY RE-

②See *Byas v. U. S.,* 182 F. 2d 94, 96-97 (CCA D.C. 1950) (no definition needed for word, "arrange"); *Shreve v. U. S.,* 103 F. 2d 796, 812 (CCA 9, 1939) (no definition needed for words, "affirmative acts"); and *Wishart v. U. S.,* 29 F. 2d 103, 105-106 (CCA 8, 1928) (no definition needed for word, "smuggling").

③See e.g., *Hart v. U. S.,* 112 F. 2d 128, 132 (CCA 5, 1940); *Schackow v. Government of the Canal Zone,* 108 F. 2d 625 (CCA 5, 1939). *Cf., Coffin v. U. S.,* 162 U. S. 664, 674-675 (1896).

GARDING THE FALSITY OF THE REPRESENTATION THAT THE LITTLE AMERICA MOTEL ENTERPRISE HAD OFFERED TO PROVIDE THE ENTIRE CAPITAL FOR THE PROPOSED MOTEL INSURANCE COMPANY. (WALTERS-CAIN BRIEF, POINT III)

It is conceded by Terry that representations were made to investors substantially as alleged in Misrepresentation No. 9 of Count I of the Indictment. (Terry Br. 17). Apparently Cain attributed the origin of this statement to Walters. (R. 1094). Numerous witnesses testified that they were told that the Little America Motel interests were so enthused about the motel insurance company plan that they offered to advance the entire amount of capital required.

To prove the falsity of the representation, Mr. Stephen G. Covey was called and he testified that he and his family, together with some other associates, were the owners of the Little America and New America enterprises. He denied that he or his company had ever offered to invest in this motel insurance venture, pointing out that their insurance was purchased from his sister's husband who was in the insurance business (R. 250). He further testified that he did not think that his brother "even would be into the subject" and "would be very unapt to even discuss this type of thing to the extent of anything that was of an arranging nature". (R. 254).

It is submitted that Covey's testimony was properly admitted to prove that the Little America enterprise

had made no offer to finance the proposed motel insurance company. Obviously, any offer of commitment to the extent of furnishing $100,000 or more would have required action of which Covey would have had notice. The Covey testimony was competent when admitted, and since it was uncontradicted, was conclusive of the falsity of the statements made.

Even conceding *arguendo* that the testimony of Covey left something to be desired to prove conclusively the lie relating to the alleged Little America offer, it would have been improper for the court to have instructed the jury to disregard this evidence. By so doing the court would have laid itself open to the criticism that by instructing the jury on the insufficiency of this proof, it inferentially was instructing them that the proof of all other issues was sufficient.

As stated the court in *United States v. Bookie,* 229 F. 2d 130, 134 (CCA 7, 1956):

> "Obviously, it is improper for the court to cast suspicion or doubt on the testimony of any particular witness or to intimate that certain testimony is worthy or unworthy of belief, or that it is not conclusive. It follows that an instruction which singles out one established fact in the case and informs the jury that from that fact alone as a matter of law a certain conclusion does not follow, invades the province of the jury. 88 C.J.S., Trial, Secs. 276, 340 pp. 740, 908, citing cases; 64 C.J., Trial, Sec. 601 p. 690)."

Finally, as conceded by appellants, the Government is not required to prove each of the fraudulent representations alleged in the Indictment, provided that sufficient of them are proven to make out the scheme to defraud. *Levine v. U. S.,* 79 F. 364, 369 (CCA 9, 1935); As stated in *Lewis v. U. S.,* 38 F. 2d 406, 410 (CCA 9, 1930):

> ". . . if any one of the material representations made were false and known to be so by the appellants, and that purchases were made in reliance thereon, the conviction must be sustained, regardless of the proof or failure of proof of other items of alleged fraud."

IV

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY THAT A SCHEME TO DEFRAUD MAY INCLUDE LATER EFFORTS TO AVOID DETECTION OF THE FRAUD. (TERRY BR., POINT IV; WALTERS-CAIN BR., POINT V).

Appellants object to the following instruction of the trial court:

> "A scheme to defraud may well include later efforts to avoid detection of the fraud. Avoidance of detection and prevention of recovery of the properly fraudulently obtained may be a material part of the illegal scheme." (R. 1347).

Appellants contend that such a charge was prejudicial since there was no evidence that anyone except the defendant Jensen tried to cover up or avoid detection. (Walters-Cain Br. 31; Terry Br. 28).

The short answer to appellants' claim is that the instruction was properly given, against a background of ample evidence that the scheme here included efforts to avoid detection of fraud, and is a correct statement of the law. *Marshal v. U. S.,* 146 F. 2d 618, 620-621 (CCA 9, 1944); *U. S. v. Riedel,* 126 F. 2d 81 at 83 (CCA 7, 1942).

The "cover up" activities in this case were, in fact, an integral part of the scheme. Appellants' contention that Jensen alone participated in such activities does not square with the facts. All appellants knowingly sold surplus certificates not authorized by the Insurance Commissioner, for purposes falsely represented as having his approval, and all appellants kept on selling when the authorized limit had been reached. (R. 474-475). In January it was Terry who suggested that they could pick up these surplus certificates and give receipts for stock. The suggestion of giving back the investors money was rejected. (R. 478-480). It was Terry and Walters who then called on investors and told them the fantastic story that the company was about ready to start operations, that they wanted to put the money to work by construction of a motel, and that the stock had already doubled in value. (R. 153, 191, 321). All of this was done, according to Jensen, in furtherance of the scheme to cover up the unauthorized sale of surplus

certificates, while Jensen was doctoring the books (R. 480-482). During the period when Terry and Walters were urging investors to exchange their certificates for stock, or to waive getting their certificates, Terry and Walters told none of the investors that the Insurance Commissioner was making an examination and had ordered the unauthorized sale of surplus certificates stopped. As late as April, 1955, it was Terry who was allaying the concern of Mrs. Evanson and Elmer Schneidmiller when receivership proceedings were imminent. In defendants' plans the scheme certainly was far from ended. Had they been successful in deceiving the authorities and concealing their fraud from investors they would next have proceeded to sell stock in their venture (R. 1036, 1286-1287, 1304), no doubt reloading earlier purchasers with more worthless securities.

In the case of Cain it might be argued that he was not a party to this subsequent cover up activity, although he was aware of the oversale of spurplus certificates (R. 1042), and that the company had never paid a dime of interest (R. 1050-1051), was a party to the secret agreement (Exhibit 46) and admitted that he did not make any inquiries or dis-

closures to the Insurance Commissioners. (R. 1098). However, Cain was a party to the scheme and the conspiracy and he is chargeable with the acts of his co-conspirators to carry the conspiracy to its completion until he has proven by affirmative action that he severed himself from it. *Pinkerton v. U. S.*, 328 U. S. 640, 646, 647; *U. S. v. Cohen,* 145 F. 2d 82 at page 90, and cases therein cited. No such showing was made by Cain to give merit to his objection to the instruction in question.

Appellants argue that the deception practiced in persuading investors to exchange their surplus certificates for receipts of stock could not be used to show a continuation of the fraudulent scheme. (Terry Br. 31: Walters-Cain Br. 33). This argument is based upon an erroneous understanding of the provisions of the Securities Act of 1933. Appellants urge that the provisions of 15 U.S.C.A., Sec. 77c (a) (9) exempt from the provisions of the Securities Act, "any security exchanged by the issuer with its existing security holders exclusively". They have overlooked the provisions of subsection (c) of 15 U.S.C.A., Sec. 77q, under which the securities fraud counts of the Indictment are charged. This paragraph provides:

> "(c) The exemptions provided in Section 77c of this title shall not apply to the provisions of this section."

V

THE COURT PROPERLY EXCLUDED THE TESTIMONY OF MRS. FRANCES WALTERS. (WALTERS-CAIN BR., POINT VI.)①

Mrs. Frances Walters, wife of appellant, was called as a witness and asked to relate a conversation had with Jensen in May, 1955. Although an offer of proof was made, the facts to which the witness would have testified are not clearly set forth. It is implied the testimony would have been that "Jensen was calling up trying to get Mr. Walters back and stating that everything was all right in the company." (R. 1317). (Walters-Cain Br. 34).

The court ruled that the testimony was of an impeaching nature and inadmissible because no proper foundation had been laid when Jensen was on the stand. (R. 1315). Appellants Walters and Cain apparently concede the correctness of this ruling, if the evidence were merely for impeachment purposes, but argue that the proffered testimony would be admissible to prove that Jensen might well have told Mrs. Walters that this company was prospering, and that she in turn communicated this to Walters (R. 1316), or to show that Jensen had received the appellants previously and throughout the entire course of the alleged fraudulent scheme.

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①Terry did not join in this specification of error.

We submit that the proffered testimony would have no probative value. It might as logically be speculated that Jensen made such a statement to Mrs. Walters to conceal from her that her husband was involved in a fraudulent scheme. In face of the mass of evidence showing appellants' full knowledge of the company's background and business, it would be naive to believe that he was as trusting of Jensen's assurances as his wife professed to be.

We submit that if Walters wished to contest with Jensen on whether Jensen made any statements to him, he was privileged to take the stand. Since he did not do so, he can scarcely complain to the court's failure to permit his wife to "stand in" and testify to what Jensen *might* have told Walters.

CONCLUSION

For reasons set out above it is submitted that the Judgment of the District Court should be affirmed.

Respectfully submitted,

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RINER E. DEGLOW,
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